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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

16)
17)
18)
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21)
UNITED STATES OF AMERICA,) Criminal Case No. 08CR0918-L
v.) GOVERNMENT'S MOTION IN LIMINE TO
FE S. GARRETT) INTRODUCE STATEMENTS
Defendant.) Fed. R. Evid. 801(d)(2)(C), 801(d)(2)(D),
) 801(d)(2)(E)
)
)

23 Plaintiff, United States of America, by and through its counsel Karen P. Hewitt, United
24 States Attorney, Christopher S. Strauss, Special Assistant United States Attorney and Elizabeth C.
25 Hadden, Trial Attorney, Tax Division hereby submits its Motion in Limine to Introduce Statements.
26 The United States respectfully moves the Court to issue a pretrial ruling that statements made by
Gregory Garrett, Sr. to Internal Revenue Service Special Agent Cecila Braga are admissible against

1 Defendant as admissions by a party opponent pursuant to Federal Rules of Evidence 801(d)(2)(C),
 2 801(d)(2)(D), and 801(d)(2)(E).

3 The admissibility of Gregory Garrett, Sr.'s statements is preliminary determination pursuant
 4 to Fed. R. Evid. 104(a). Rule 104(a) states that “[p]reliminary questions concerning . . . the
 5 admissibility of evidence shall be determined by the court.” In making the preliminary
 6 determination of admissibility, the Court is not bound by rules of evidence, other than those relating
 7 to privileges. Rule 104(a); Fed. R. Evid. 1101(d)(1). Bourjaily v. United States, 483 U.S. 171,
 8 175-76, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987) (The court may consider evidence that would be
 9 inadmissible under the Federal Rules of Evidence); Gabaig v. Gabaig, 1999 U.S. App. LEXIS 32805
 10 (9th Cir. Cal. Dec. 15, 1999) *citing United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988)
 11 (The court may rely in part, but not solely, on the alleged co-conspirator's statement itself.)

12 The Court has set a motion hearing on August 25, 2008 at 2:00 P.M. and a Motion In Limine
 13 hearing on September 2, 2008, at 10:00 A.M. The United States requests an evidentiary hearing at
 14 the Court's convenience and to the extent necessary for the Court to enter a pretrial ruling with
 15 respect to the statements the Government seeks to introduce.

16 In support of this motion, the Government respectfully submits the following:

17 **STATEMENT OF FACTS**

18 On April 1, 2003 Special Agent Cecilia Braga (“SA Braga”) met with Internal Revenue
 19 Service Special Agent Len Bradley and Special Agent Liz Zaroni and underwent a briefing with
 20 respect to an undercover scenario regarding the Defendant. During that meeting SA Braga was
 21 shown photographs of Defendant and her husband, Gregory Garrett, Sr., who is an unpaid employee
 22 at Defendant's tax preparation business.

23 On April 2, 2003 SA Braga met with Tech Special Agent Robert Brana who fitted SA Braga
 24 with an Eagle recording device and a transmitter. The devices were activated and placed into SA
 25 Braga's purse.

26 SA Braga was driven to the Defendant's tax preparation business at 914 East 8th Street, Suite
 27 213, San Diego, California. When SA Braga went into the Defendant's tax preparation business, she
 28 Government's Motion in Limine to
 Introduce Statements

1 posed as a potential client, Cecilia Vicente, who wanted her 2002 federal and state income tax
 2 returns prepared. SA Braga observed Gregory Garrett meeting with another client. SA Braga had a
 3 lengthy conversation with the Defendant regarding, among other matters, the Defendant's "style" of
 4 tax return preparation.^{1/} SA Braga left a single Form W-2 Wage and Tax Statement and her personal
 5 information with the Defendant in order to have the Defendant prepare her tax returns.

6 On August 6, 2003 SA Braga met with Special Agent Ed Reyes and again was fitted with a
 7 recording device and transmitter. SA Braga went back to the Defendant's office to pick up the 2002
 8 federal and state tax returns that the Defendant had prepared for her under the name of Cecilia
 9 Vicente. When she went into the Defendant's business, Gregory Garrett, Sr. met with SA Braga,
 10 gave SA Braga her completed tax returns, and answered SA Braga's questions regarding the tax
 11 returns. Defendant was not in the office at the time. During the conversation that SA Braga had
 12 with Gregory Garrett, Sr., he made numerous statements regarding the false and fraudulent nature of
 13 the federal tax return prepared for SA Braga by the Defendant. Below transcribed excerpts of the
 14 recorded conversation that the United States seeks to have admitted^{2/}:

15 **GREG:** Okay.

16 **Braga:** So I'm getting a refund?

17 **GREG:** Yes. That's your federal. Let me go ahead and put this together for you. Okay?

18 **Braga:** So where do you guys do the -- the refinances -- here or at your house?

19 **GREG:** No. Right here. Everything's done here.

20 **Braga:** Can I actually have a couple of friends that want to refinance but the interest rates
 21 are going up right now but --

22 **GREG:** No. Actually they're starting to go down.

23 **Braga:** Are they starting to go down?

24 **GREG:** We just got word today from our lenders. That the rates are starting to sweeten a

25
 26 ^{1/}The Government also intends to introduce the recorded conversation between the defendant and
 SA Braga at trial pursuant to Fed. R. Evid. 801(d)(2)(A).

27 ^{2/}A complete copy of the transcript is attached as Exhibit "A" for the Court's review.

1 little bit.

2 **Braga:** Oh, that's good.

3 **GREG:** So it's going to take a couple of weeks. They
4 they shot up so high so quick that it caught everybody off guard but now I think they're going back
5 down.

6 **Braga:** Because there's actually one of my friends that is considering buying a brand new
7 house in a brand new development and they need to get a pre-approval letter --

8 **GREG:** Okay.

9 **Braga:** -- right away if they decide to. Is there -- is there a phone number that I could give
10 them to call Fe right away?

11 [PHONE RINGING]

12 **GREG:** Yeah. Yeah. Let me get this here, just a second here.

13 **Braga:** Okay.

14 [PHONE RINGING]

15 **GREG:** Garrett's Realty and Mortgage. Hello. Hi. How are you? Ma'am, we have until
16 the 15th of August, and she's trying to get everybody taken care of even as we speak. But
17 it's going to take a couple more days. She has about 70 more to go. Yes. I'm pretty sure it
18 is. Well, I'm going -- I'm going through the files right now. She just did bunch and it's
19 going to take me maybe another four or five hours for me to go through them all. So if yours
20 is one of them, I'll give you a call right away. Okay? Okay. That's fine. Give me a call.
21 Give me -- if I don't call you today give me a call in a couple of days. Okay. Bye.

22 **Braga:** Is this -- is this my return because --

23 **GREG:** No. That's your --

24 **Braga:** -- who -- who -- who is this person, this (inaudible)?

25 **GREG:** Okay. Let me explain that in just a second.

26 Let me finish --

27 **Braga:** Okay. Okay.

1 **Greg:** -- doing this and get this together for you here. This -- this -- oh, shoot. That's the
2 wrong one.

3 **Braga:** This is great. I get a refund back. Last year I had to pay.

4 **Greg:** There's no state. Okay. Oh, I see. Let me see that just for a moment.

5 **Braga:** Okay.

6 **Greg:** Okay. That's the federal. (Inaudible) there's no state. Okay. (Inaudible.) This is
7 your copy here. Okay. Anyway, this is your 2002.

8 **Braga:** Okay.

9 **Greg:** And your W-2 copy (inaudible).

10 **Braga:** (Inaudible.)

11 **Greg:** Okay. Just give me a moment and let me -- let me finalize this real quick and I'll --
12 I can explain everything to you.

13 **Braga:** I'm sorry. Okay.

14 **Greg:** Okay. So you're getting back 1,417 from state.

15 **Braga:** Okay.

16 **Greg:** And 1,396 from federal. Total expected is 2,813.

17 **Braga:** Great.

18 **Greg:** Okay. Add childcare. Okay. You had a question about the childcare.

19 **Braga:** Yeah.

20 **Greg:** Okay.

21 **Braga:** Because my --

22 **Greg:** The --

23 **Braga:** -- my parents take care --

24 **Greg:** The -- oh, your parents were taking care?

25 **Braga:** Yeah. I didn't have any. I don't even know who this person is.

26 **Greg:** Oh, I see. Okay. This is her -- this is her loophole.

27 **Braga:** Her loophole?

1 **GREG:** Yeah. We're -- for getting you some money back because otherwise you end up
2 having to pay. Basically what the federal government does, they have a rule that says if you
3 have a childcare provider -- and in living in San Diego, a lot of them are illegal immigrants
4 from Mexico. If they refuse to give you a social security number you can state so on the
5 form that you tried to get a social and she refused to give it to you and they do allow the
6 child credit.

7 **Braga:** I won't get -- will I get in trouble for that?

8 **GREG:** No. Fe does this for everybody. This is -- this is a normal thing she does.

9 **Braga:** Even though if it's not true?

10 **GREG:** Basically your parents were taking care of your kids.

11 **Braga:** Yeah.

12 **GREG:** But if you try to do that you won't get a credit for it and you'll -- you'll have to
13 pay.

14 **Braga:** But I won't get in trouble. That's what you said.

15 **GREG:** No. No. Fe takes care of this. This is easy for her to do.

16 **Braga:** Okay.

17 **GREG:** Because this is -- this is easily -- this is easy to -- because basically what she has
18 here --

19 **Braga:** Because she also has something else over here.

20 **GREG:** Yeah. I'll show you that in a second.

21 **Braga:** Okay.

22 **GREG:** It's right here. This is the -- this is the cover for the loophole. Okay? This simply
23 says, "I requested childcare provider to furnish me her social security number" --
24 or -- or -- actually she wrote this backwards. It's supposed to be TIN number, "and she
25 refused to give me the information I needed even though I asked so many times."

26 **Braga:** Okay.

27 **GREG:** This -- this -- this covers that. So you get your deduction.

1 **Braga:** Okay.

2 **GREG:** And the next thing here is your -- this is your -- this is for your expenses for your
3 work as a nurse.

4 **Braga:** I didn't have any. Really. I didn't have any. I didn't give any. But --

5 **GREG:** As an RN you have them whether you know it or not. You have to pay license fees.
6 You have uniforms. What else do you have to do? Sometimes you have to attend seminars.

7 **GREG:** And --

8 **Braga:** So she just -- she just estimated --

9 **GREG:** This -- this -- this estimates -- yeah -- what you have to spend as a nurse. Okay.
10 Because as a nurse you have deductions in regards to (inaudible). You have to buy uniforms,
11 you have to get them dry cleaned, et cetera,
12 et cetera And this is her contributions to charity. You're allowed to contribute up to five --
13 under \$5,000 without receipts so that's why she --

14 **Braga:** Is that another loophole?

15 **GREG:** Yes.

16 **Braga:** Because I didn't donate anything.

17 **GREG:** Well, that doesn't matter. Okay? We do this
18 for -- we do this for the FBI as well. Okay. We have clients who are FBI, sheriffs, deputy
19 sheriff, you name it. Okay? This is covered by the rule that says you can donate under
20 \$5,000 without a receipt. Anything over five -- anything over \$5,000 you have to have an
21 appraised value. So don't worry about this. Again, this is another one of their loopholes that
22 we use.

23 **Braga:** Okay. . .

24 . . .

25

26

27

1 **GREG:** I sure will. Okay. And on yours, 1,396 federal; 1,417 state; for a grand total of
2 \$2,813. Okay. So if you do have any problems just give Fe a call. And she will take care of
3 it for you.

4 **Braga:** Okay. And what time is she here?

5 **GREG:** Probably not for another couple of hours (inaudible) she stays there all day. She
6 likes to chat too much.

7 **Braga:** I know the last time I was here we were talking for a long time and I didn't even
8 have an appointment.

9 **GREG:** I know.

10 **Braga:** Okay. So do you have a number that I can call her when -- if I have any questions?
11 How much do I owe?

12 **GREG:** Let's see, right there, 225.

13 **Braga:** 225.

14 **GREG:** Okay.

15 **Braga:** Can I get a receipt? Because this is cash.

16 **GREG:** Sure.

17 **Braga:** Two hundred twenty -- is that the normal cost?

18 **GREG:** Oh, actually --

19 **Braga:** So much.

20 **GREG:** No. Actually we're cheaper than H&R Block.

21 **Braga:** Oh, really?

22 **GREG:** They charge \$25 to \$30 per W-2. In addition to anything else they do. So we're
23 actually -- she's actually cheaper. Okay. She bases -- her fees are based on your annual
24 income, not on how much money you get back.

25 **Braga:** Oh, okay. And based on my what? My income
26 and --

27 **GREG:** Your annual income.

1 **Braga:** And how much money I get back? No.

2 **GREG:** No. We don't base it on your refund.

3 **Braga:** Okay.

4 **GREG:** It's based upon how much you make during the course of the year.

5 **Braga:** Okay. So just call her here. This is -- this is the same one.

6 **GREG:** Yeah, the number where I circled. yeah.

7 **Braga:** Okay.

8 ...

9 **Braga:** Okay. Great. Thank you so much. So I save this for next year or no? You guys
10 have --

11 **GREG:** The one that's -- the one that had the envelopes you mail in and the ones that are
12 here.

13 **Braga:** Okay.

14 **GREG:** Basically this right here is a comparison between the way Fe does taxes and H&R
15 Block.

16 **Braga:** So this is --

17 **GREG:** If this was -- if this was H&R Block doing your taxes you would end up paying
18 \$3,534 to IRS.

19 **Braga:** Oh, God.

20 **GREG:** State you would only be getting -- let me see here. And then you had to pay the
21 state \$87. So --

22 **Braga:** Wow. That's a big difference.

23 **GREG:** Yeah.

24 **Braga:** That's because of all the loopholes she put in.

25 **GREG:** You know what? I'm just going to have to give this to you for 220 even because I
26 don't have any change.

27 **Braga:** Okay.

1 **GREG:** So just hold on to that.

2 **Braga:** You want to change this then?

3 **GREG:** I'll just make a little notation on there.

4 **Braga:** Okay.

5 I talked to your daughter, Dulce.

6 **GREG:** Yeah.

7 **Braga:** A lot.

8 **GREG:** Oh, yeah.

9 **Braga:** It seems like she was here the most.

10 **GREG:** Yeah. She is.

11 **Braga:** I'd call and she would say something like all you guys are sleeping. Because you
12 guys are working late

13 and -- but does she work here every day?

14 **GREG:** Yeah. She's our loan processor.

15 **Braga:** Oh, so she doesn't do anything with the tax. It's just your sons --

16 **GREG:** No.

17 **Braga:** -- and --

18 **GREG:** No. It's basically my sons, me and Fe and that's it.

19 **Braga:** Oh.

20 **GREG:** Let me give you this back.

21 **Braga:** So are you the lucky one that doesn't have to help prepare these or --

22 **GREG:** No. Actually we all have to. We all have to help out so we're all here -- I'm here
23 maybe 18, 19 hours a day.

24 **Braga:** Oh, my gosh.

25 **GREG:** So -- well, it's a lot you know (inaudible) more than 2000 clients a year so it's a big
26 headache.

27 **Braga:** Oh, yeah. When Dulce was telling me I think she said that -- that Fe had 500 to 700

1 more to go. I go, "And she's doing this by herself?"

2 **GREG:** No. Actually, like I said, I have my son here helping her.

3 **Braga:** That's Mike and Tony?

4 **GREG:** Yeah.

5 **Braga:** They're -- they also --

6 **GREG:** Well, Mike -- Mike --

7 **Braga:** -- help her prepare?

8 **GREG:** Mike -- Mike is licensed -- basically Mike and I just put them together.

9 **Braga:** And put them in the --

10 **GREG:** But Tony's licensed to -- to -- to do the tax, along with his mom so --

11 **Braga:** Oh, okay.

12 **GREG:** So he's doing them with her and between the two of them they get saturated. And
13 it's going to get worse next year, I know it because I'm going to have a lot more. Like I said,
14 I got a lot more FBI coming in, a lot more police, a lot more correctional guards that work
15 over at Otay prison. We get the prisons, we get the bus drivers, we get the nurses, we get the
16 cops.

17 **Braga:** Oh, my God. I'm already kind of scared with all this stuff here.

18 **GREG:** No. Don't be.

19 **Braga:** And then, but they know that too and they're not scared? No.

20 **GREG:** We do this for everybody.

21 **Braga:** Oh, wow.

22 **GREG:** It's something that can be -- it's defensible, that Fe can -- Fe can --

23 **Braga:** So if I get audited she'll -- she'll be right there?

24 **GREG:** Yeah. Yeah. So it's not a problem.

25 **Braga:** Okay. Okay. Okay. That sounds good. All right. Well, thank you very much. I
26 appreciate it. This was my first time here and it was pleasant. I just have to know to make
27 my appointment way in advance.

GREG: Yeah. Give me a call the day after Christmas.

Braga: Okay. That sounds good.

GREG: And what we'll do is -- if you don't have your paperwork in on time we can guestimate when it will arrive and tack on a couple of days for your appointment.

Braga: Okay.

GREG: But if you wait for your paper to come in, I'll be seeing you in August next year.

Braga: Okay. All right. Well, thank you very much. I appreciate it.

GREG: You're welcome.

Braga: Bye. Nice to meet you.

10 || (See Exhibit A: pgs 6-12; 14-16; 17-21)

LAW AND ARGUMENT

I. The statements made by Greg Garrett, Sr. are admissible as admissions by a party opponent pursuant to Federal Rule of Evidence 801(d)(2)(C)

14 For a statement to be admissible under Federal Rule of Evidence 801(d)(2)(C), the
15 government, as the proponent of the evidence, must prove that the declarant of the statements sought
16 to be admitted is an agent of the party-opponent and that the party-opponent authorized the declarant
17 to make the statements. See United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006);
18 United States v. Sokolow, 91 F.3d 396, 402 (3rd Cir. 1996); Precision Piping & Instruments, Inc. V.
19 E.I. dePont de Nemours & Co., 951 F.2d 613, 619 (4th Cir. 1991); United States v. Sanders, 749
20 F.2d 195, 199 (5th Cir. 1984). The question of whether an agency relationship exists between the
21 declarant and the party-opponent is a preliminary determination for the Court under Federal Rule of
22 Evidence 104(a); the government must show that foundation with “substantial independent
23 evidence” not by a preponderance of the evidence. United States v. Flor, 679 F.2d 173, 178 (9th
24 Cir. 1981) *citing United States v. Zemek*, 634 F.2d 1159, 1170 (9th Cir. 1980); Hilao v. Estate of
25 Marcos, 103 F.3d 767, 775 (9th Cir. 1996).

26 Courts require that a “declarant be an agent of the party-opponent against whom the
27 admission is offered” before statements of that declarant will be admissible under Federal Rule of
28 Government’s Motion in Limine to

1 Evidence 801(d)(2)(C). Sokolow, 91 F.3d at 402; Kirk v. Raymark Indus., 61 F.3d 147, 164 (3rd
 2 Cir., 1995); see also Godinez, 444 F.3d at 960 (stating that the interpreter was an agent of the
 3 Defendant, and thus the interpreter's translation could be "attributable to the Defendant as his own
 4 admission"); Sanders, 749 F.2d at 198-99 (stating that claim forms submitted by the Defendant's
 5 employees were admissible under 801(d)(2)(C) because they were agent's of the Defendant).
 6 Whether a declarant has the "authority" of an agent of a party-opponent is determined by the laws
 7 of agency. See United States v. Da Silva, 725 F.2d 828, 831-32 (2nd Cir. 1982). Under agency law,
 8 the most significant test to determine if any agency relationship exists is whether the principal can
 9 "control" the agent. Kirk, 61 F.3d at 164 (3rd Cir. 1995); Ferguson v. United States, 712 F. Supp.
 10 775, 780 (N.D. Cal. 1989).

11 In addition to the agency requirement, a party-opponent must give a declarant "authority to
 12 speak" about a particular subject matter before the declarant's statements are admissible under
 13 801(d)(2)(C). See Precision Piping, 951 F.2d at 619; Sanders, 749 F.2d at 199 (5th Cir. 1984); Reid
 14 Brothers Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1306 (9th Cir. 1983). However,
 15 implied authority to speak on the party-opponent's behalf, rather than express authority, may be
 16 inferred from the scope of actual authority that the party opponent gave to the declarant. See United
 17 States v. Iaconetti, 540 F.2d 574, 577 (2nd Cir. 2002); Hanson v. Waller, 888 F.2d 806, 814 (11th
 18 Cir. 1989).

19 Here, Gregory Garrett, Sr.'s agency is established through multiple sources. First, on April
 20 2, 2003 and August 6, 2003, SA Braga observed Gregory Garrett, Sr. assisting other customers while
 21 she was at the office. On April 2, 2003 when SA Braga entered Defendant's office Gregory Garrett,
 22 Sr. was behind the front desk assisting another client. She waited in the front portion of the office
 23 until he was available to assist her. At the same time, Defendant was behind the counter assisting
 24 another client as well. (See Exhibit B)

25 On August 6, 2003, SA Braga witnessed Gregory Garrett, Sr. three other clients. He assisted
 26 the first client over the phone. (see Exhibit A: pg 7, lines 8-25; pg 8, line 1). He explained to the
 27 client when the return would be ready and that he will call them back when it was ready. The
 28 Government's Motion in Limine to

1 second client came in to the office. He assisted that client with their tax return explaining that there
2 was a problem with the return so he could not provide it to the client until he figured out the
3 problem. (see Exhibit A: pg 1, lines 9-25; pgs 2-4). He also told the client that he will find out what
4 is wrong with the return and that the client should come back later. Later on in the conversation SA
5 Braga witnessed Gregory Garrett, Sr. with a third client who came into the office. (see Exhibit A:
6 pg 12, lines 8-25; pgs 13-14). SA Braga observed Gregory Garrett, Sr. assisting this client with a
7 new appointment and providing the client with a completed return. He points out the client's refund
8 amount. He then explains to the client that they would have had to pay \$8,469 instead of getting a
9 refund if the client had gone to another commercial tax return preparation firm.

10 Second, Defendant's daughter, Dulce Wickstrom further establishes Gregory Garrett, Sr.'s
11 agency. Dulce Wickstrom worked as a mortgage processor for the real estate service end of the
12 Defendant's business. She stated that her step father, Gregory Garrett, Sr., would meet with the
13 clients, collect the documents from the clients and collect and deposit the clients' fees. (See Exhibit
14 C.)

15 Third, Defendant herself establishes Gregory Garrett, Sr.'s agency. Defendant told Special
16 Agents Len Bradley and Maria Alvarez on December 10, 2003 that Gregory Garrett, Sr. worked at
17 her business but that he was not paid. She said that he would receive the documents from the
18 clients, contact them when the returns were complete and that he would receive the payments from
19 the clients. (See Exhibit D: para. 11, 12, 15)

20 Fourth, the taxpayers who had their returns prepared by the Defendant establish Gregory
21 Garrett, Sr.'s agency. The taxpayers will testify at trial that Gregory Garrett, Sr. would set up their
22 appointments, take their paperwork when they arrived at the office, call them when the return was
23 completed, provide them the completed return when they arrived at the office and take the payment
24 for the preparation of the tax returns. The taxpayers will also say that while they were at the office,
25 Gregory Garrett, Sr. would be working the front desk by answering the phone and dealing with other
26 clients. All of the taxpayers will testify that at some point Gregory Garrett, Sr. was involved in the
27 process of getting their tax returns prepared.

1 In addition to being Defendant's agent, Gregory Garrett, Sr. was given the authority by
 2 Defendant to make the statements he made. As discussed above Gregory Garrett, Sr. had at least the
 3 implied authority because of the very nature of his position in the Defendant's business. However,
 4 he also had the actual authority as stated by Defendant to SA Braga when SA Braga met with her on
 5 April 2, 2003:

6

7 **Braga:** Do you go - - - I'm just going to drop my stuff off, but - - so when I come pick it - -
 8 you're going to call me up when it's done?

9

Garrett: We'll call you.

10

Braga: Do you go over the return with me?

11

Garrett: My husband does.

12

Braga: Oh, Okay.

13

Garrett: Yeah, if there is a question like why, most of the question is -- how can you
 14 explain why I have a little refund right now than last year. Then I will explain. I usually
 15 explain in the paper, I analyze --

16

 (See Exhibit B)

17

 That actual authority was further shown by Gregory Garrett, Sr. when he told Special Agents Toni
 19 Haas and Ed Reyes on December 10, 2003 that he is employed by his wife and that his position is
 20 office assistant. He stated that his job duties are answering phones, taking messages and filing. (See
 21 Exhibit E, paragraph 6). He also stated that Defendant would write down for him what information
 22 to go over with the client if she was not there and she also gave him the authority to sign her name
 23 on the tax returns for her. (See Exhibit E: paragraph 15, 50). Therefore, the evidence establishes
 24 Gregory Garrett, Sr.'s agency and the authority granted to him by Defendant to speak on her behalf.

25

II. The statements made by Greg Garrett, Sr. are admissible as admissions by a
party opponent pursuant to Federal Rule of Evidence 801(d)(2)(D)

27

 28 Government's Motion in Limine to
 Introduce Statements

1 For a declarant's statement to be admissible under Federal Rule of Evidence 801(d)(2)(D),
 2 the government must establish the proper foundational requirements: that the statement was made by
 3 the party-opponent's agent and concerned a matter within the scope of the agency relationship. Sea-
 4 land Service, Inc. v. Lozen Intern., 285 F.3d 808, 821 (9th Cir. 2002); United States v. Chang, 207
 5 F.3d 1169, 1176 (9th Cir. 2000). The government must prove agency with substantial evidence
 6 under Federal Rule of Evidence 104(a), however, a preponderance of the evidence is not required.
 7 Hilao, 103 F.3d at 775 (9th Cir. 1996); United States v. Jones, 776 F.2d 412, 415 (9th Cir. 1985)
 8 (abrogated on other grounds by Hilao, 101 F.3d 767); Flor, 679 F.2d at 178. In making a Rule 104(a)
 9 preliminary determination regarding the proper foundation for the admissibility of a statement under
 10 801(d)(2)(D), the Court may consider the out-of-court statements sought to be admitted, although
 11 the statements alone are not sufficient to establish the foundation. Fed. R. Evid. 801(d)(2); Sea Land,
 12 285 F.3d at 821 (9th Cir. 2002); Hilao, 101 F.3d at 775; In re Coordinated Pretrial Proceeding in
 13 Petroleum Prods. Antitrust Litig., 906 F.2d 432,458 (9th Cir. 1990).

14 The first requirement for the admission of a statement of an out-of-court declarant under
 15 801(d)(2)(D) is that the declarant is an agent of the party opponent. Sea-Land, 285 F.3d at 821;
 16 Chang, 207 F.3d at 1176. The Federal Rules of Evidence do not define agency, but courts have
 17 "adopted and applied the traditional meanings of this term as reflected by the federal common law of
 18 agency." Gomez v. Rodriguez, 344 F.3d 103, 116 (1st Cir. 2003); see also United States v. Ellyson,
 19 326 F.3d 522, 527 (4th Cir. 2003); City of Tuscaloosa v. Harcros Chems., Inc. 158 F.3d 548, 557
 20 (11th Cir. 1998); Lippay v. Christos, 996 F.2d 1490, 1497 (3rd Cir. 1993); United States v. Saks,
 21 964 F.2d 1514,1523-24 (5th Cir. 1992). To establish that an agency relationship exists for purposes
 22 of 801(d)(2)(D), the party-opponent must have some control over the actions of the declarant, or the
 23 declarant must be answerable and responsible to the party-opponent. United States v. Rioux, 97
 24 F.3d 648, 660 (2nd Cir. 1996) (stating that the government need only establish that the declarant was
 25 "answerable and directly responsible" to the party-opponent to establish an agency relationship);
 26 Lippay, 996 F.2d at 1499 (stating that "continuous, supervisory control" is required to establish an
 27 agency relationship).

1 In this case Greg Garret's agency and Defendant's control over that agency is established
 2 through statements by Defendant herself , statements by Gregory Garrett, Sr. and by the
 3 observations of SA Braga when she was in the office. Defendant told Special Agents Len Bradley
 4 and Maria Alvarez on December 10, 2003 that Gregory Garrett, Sr. worked at her business but was
 5 not paid. She said that Gregory Garrett, Sr. would collect documents from the clients, would contact
 6 them when the return was complete and would collect payment from the clients. She also said that
 7 Gregory Garrett, Sr. would pass tax questions on to her. (Exhibit E: paragraph 6). Greg Garret's
 8 duties at the business will be further confirmed by the taxpayers at trial when they testify about their
 9 interactions with him while they were getting their tax returns prepared. His duties are also
 10 confirmed by Defendant's daughter, Dulce Wickstrom. (Exhibit C). On April 2, 2003, Defendant
 11 told the SA Braga that when SA Braga's return was complete, Gregory Garrett, Sr. would go over it
 12 with her. (Exhibit B).

13 Gregory Garrett, Sr. told Special Agents Toni Haas and Ed Reyes on December 10, 2003 that
 14 he was employed by his wife and that his position was office assistant. His job duties were
 15 answering the phones, taking messages and filing. He said he held the position for 3 years. He also
 16 stated that if Defendant was not in the office then he would review the tax returns with clients. He
 17 would show the client how much they owed or if they were getting a refund. He said that sometimes
 18 Defendant would write down what information he should go over with the client if she was not
 19 going to be around. He also stated that sometimes Defendant would give him the authority to sign
 20 her name to the tax returns. (Exhibit F: paragraph 6, 15, 50)

21 When SA Braga was in Defendant's office she witnessed Gregory Garrett, Sr. assist 3
 22 clients. He assisted one over the phone by explaining when their return would be ready. He assisted
 23 two others when they came into Defendant's office by explaining the status of their tax returns. (see
 24 Exhibit A: pg 7, lines 8-25; pg 8, line 1; pg 1, lines 9-25; pgs 2-4; pg 12, lines 8-25; pgs 13-14)

25 In addition to an agency relationship, for a statement by a declarant to be admissible, the
 26 statement must be made within the scope of the declarant's agency. Chang, 207 F.3d at 1176. “The
 27 statement need only concern matters within the scope of the agency;’ the statements ‘need not be

1 made within the scope of the agency.”” Id. (quoting In re Sunset Bay Assocs., 944 F.2d 1503, 1519
 2 (9th Cir. 1991)). Moreover, unlike under 801(d)(2)(C), the agent need not be specifically authorized
 3 to speak about the subject matter. United States v. Portsmouth Paving Co., 694 F.2d 312, 321 (4th
 4 Cir. 1982); compare Fed. R. Evid. 801(d)(2)(C) (explicitly stating that authorization is required)
 5 with Fed. R. Evid. 801(d)(2)(D) (making no mention of an authorization requirement). Additionally,
 6 “facts regarding the agent’s duties are clearly relevant to the analysis.” Sana v. Hawaiian Cruises,
 7 LTD. 181 F.3d 1041, 1045-46 (9th Cir. 1999) (determining that the declarants were acting within the
 8 scope of their agency after examining facts related to the agent’s duties); City of Long Beach v.
 9 Standard Oil Co. of Calif., 46 F.3d 929, 937 (9th Cir. 1995) (declining to admit declarant statements
 10 because the proffering party did not introduce evidence regarding the nature of the declarant’s
 11 responsibilities).

12 The statements made by Gregory Garrett, Sr. to SA Braga were within the scope of his
 13 agency. SA Braga went to Defendant’s office to pick up her return. Gregory Garrett, Sr. was
 14 working the front desk and explained that the Defendant was not in the office. Gregory Garrett, Sr.
 15 was doing exactly the things that the Defendant told him to do. The Defendant had even told SA
 16 Braga that Gregory Garrett, Sr. would go over the return with her and that is exactly what Gregory
 17 Garrett, Sr. did. Gregory Garrett, Sr. provided the return to SA Braga and he answered any
 18 questions she had regarding the return. He also provided explanations for the false and fraudulent
 19 deductions on SA Braga’s returns and other clients’ tax returns. He explained the document that the
 20 Defendant prepared which showed the tax that would have been due if the tax return had been
 21 prepared by another commercial tax return preparation firm. Finally, when SA Braga was at
 22 Defendant’s office she witnessed Gregory Garrett, Sr. Assist two other clients with their tax returns
 23 and even point out the difference in their returns between Defendant’s preparation and if they had
 24 gone to another commercial tax return preparation firm. (see Exhibit A: pg 1, lines 9-25; pgs 2-4; pg
 25 12, lines 8-25; pgs 13-14). Everything Gregory Garrett, Sr. said to SA Braga when she picked up
 26 the return was within the scope of his agency.

27

1 **III. The statements made by Greg Garrett, Sr. are admissible as admissions by a**
 2 **party opponent pursuant to Federal Rule of Evidence 801(d)(2)(E)**

3 A declarant's statement is admissible against a party-opponent under Fed. R. Evid.
 4 801(d)(2)(E) if a conspiracy exists between the declarant and the party opponent, and the declarant's
 5 statements are made during the course and in furtherance of the conspiracy. Bourjaily v. United
 6 States, 483 U.S. 171, 171-72 (1987); United States v. Bowman, 215 F.3d 951, 960-61 (9th Cir
 7 2000). Under Rule 104(a), the government must prove the foundational requirements for the
 8 admissibility of co-conspirator statements under 801(d)(2)(E) by a preponderance of the
 9 evidence. Bourjaily, 483 U.S. at 171-72; Bowman, 215 F.3d at 960; United States v. Kelly, 864 F.2d
 10 569, 573 (9th Cir. 1989). The statements sought to be admitted, although not sufficient in themselves
 11 to establish their admissibility, may be considered by the court in making its preliminary
 12 determinations regarding the existence of a conspiracy and whether the statements were made in
 13 furtherance of such a conspiracy. Bourjaily, 483 U.S. at 172; Gabaig v. Gabaig, 1999 U.S. App.
 14 LEXIS 32805 (9th Cir. Cal. Dec. 15, 1999) *citing* United States v. Gordon, 844 F.2d 1397, 1402 (9th
 15 Cir. 1988) (The court may rely in part, but not solely, on the alleged co-conspirator's statement
 16 itself.) Additionally, "a conspiracy may be proven by circumstantial evidence and inferences drawn
 17 from such evidence." United States v. Ladum, 141 F.3d 1328, 1341 (9th Cir. 1998).

18 Although the existence of a conspiracy is required, neither the declarant nor the party-
 19 opponent need to be charged with conspiracy before the government may admit statements under
 20 801(d)(2)(E). Coconspirator exception to hearsay rule may be invoked even though Defendant is
 21 not charged with crime of conspiracy. United States v. Reynolds, 919 F.2d 435 (7th Cir. 1990)(It is
 22 not necessary to charge conspiracy in order to take advantage of rule permitting admission of
 23 coconspirator statements that would otherwise be hearsay; it is enough to show that criminal venture
 24 existed and that statements took place during and in furtherance of that scheme.); United States v.
 25 Johnson-Wilder, 29 F.3d 1100 (7th Cir. 1994)(Testimony regarding Defendant's statements was
 26 properly admitted as admissions of party-opponent, not as coconspirator statements, since no
 27 conspiracy was charged, hence court did not err in not giving jury instruction regarding admission of
 28 Government's Motion in Limine to
 Introduce Statements

1 coconspirator statements.); United States v. Peralta, 941 F.2d 1003, 1006 (9th Cir. 1991) *citing*
 2 United States v. Gil, 604 F.2d 546 (7th Cir. 1979) (holding that it makes no difference whether the
 3 declarant or any other "partner in crime" could actually be tried, convicted and punished for the
 4 crime of conspiracy.); Kelly, 864 F.2d at 569, 573 (7th Cir. 1989) (stating that "Rule 801(d)(2)(E)
 5 applies not only to conspiracies but also to joint ventures, and that a charge of criminal conspiracy is
 6 not required"). Moreover, only the party-opponent and the declarant need to be members of the
 7 conspiracy, not the witness testifying to the statement in court. United States v. Williams, 989 F.2d
 8 1061, 1067-69 (9th Cir. 1993); United States v. Zavala, 853 F.2d 1512, 1516 (9th Cir. 1988).

9 "[W]hen inquiring whether a statement was made in furtherance of a conspiracy, we do not
 10 focus on its actual effect in advancing the goals of the conspiracy, but on the declarant's intent in
 11 making it." Zavala, 853 F.2d at 1516 (internal quotations omitted). Statements are made in
 12 furtherance of a conspiracy "when a declarant seek[s] to induce [the listener] to deal with the
 13 conspirators or in any other way to cooperate or assist in achieving the conspirators' common
 14 objective, the declaration may be admissible." Zavala, 853 F.2d at 1516. Also a conspirator need
 15 not share in or even know all of the conduct of a co-conspirator, as long as all conspirators share a
 16 common purpose and know that they are part of a larger operation. United States v. Perez, 280 F.3d
 17 318, 347 (3d Cir. 2002).

18 Here, Gregory Garrett, Sr. worked the front desk of Defendant's tax preparer office. He
 19 answered the phones, made appointments, collected documents, contacted clients when returns were
 20 complete, explained the returns to the clients and collected fees. All of the taxpayers will say at trial
 21 that they dealt with Gregory Garrett, Sr. at some point throughout the process of getting their tax
 22 returns prepared. Gregory Garrett, Sr. stated on December 10, 2003 that he had been working the
 23 front desk for 3 years. (Exhibit F: paragraph 6). Therefore, he was working at Defendant's business
 24 during the years that all of the taxpayers had their 2001 and 2002 federal income tax returns
 25 prepared, including when SA Braga went undercover into Defendant's office.

26 SA Braga observed Gregory Garrett, Sr. assisting three other customers while she was at the
 27 office. As discussed above he assisted one over the phone and two more in person in the office.

1 (see Exhibit A: pg 7, lines 8-25; pg 8, line 1; pg 1, lines 9-25; pgs 2-4; pg 12, lines 8-25; pgs 13-14).
2 The third client is the most telling. SA Braga witnessed Gregory Garrett, Sr. explaining to the client
3 how they would have had to pay a over \$8,000 in taxes instead of getting a refund if they had gone
4 to another commercial tax return preparation firm. (see Exhibit A: pg 12, lines 8-25; pgs 13-14).
5 These actions by Gregory Garrett, Sr. show his complete participation in the conspiracy and show
6 his intent in furthering that conspiracy.

7 Defendant stated that Gregory Garrett, Sr. worked for her and that he performed all of the
8 above duties. (See Exhibit C: paragraph 11, 12, 15). Defendant told SA Braga that Gregory Garrett,
9 Sr. would go over the return with her which shows that he understood enough of what Defendant did
10 on the return to explain it to the clients. (See Exhibit B). When Gregory Garrett, Sr. answered SA
11 Braga's questions regarding her return he explained how Defendant used "loopholes" to get clients
12 larger refunds. (Exhibit A: pg 12, line 4; pg 18, line 10). He explained that SA Braga would get a
13 larger refund with Defendant than with another tax preparation service. (See Exhibit A: pg 17, line
14 25 - pg 18). He also told SA Braga that if she gets audited, Defendant would assist her. (See
15 Exhibit A: pg 20, line 25 - pg 21).

16 Gregory Garrett, Sr. knew everything that Defendant was doing on the tax returns and his
17 statements were calculated to further a conspiracy between he and Defendant to defraud the United
18 States. Gregory Garrett Sr.'s statements were meant to convince SA Braga that what Defendant was
19 doing on her tax return was legal and that she did it for everyone. His statements were meant to
20 assuage any concern SA Braga had with respect to the legality of Defendant's fraudulent preparation
21 of her tax return, thereby increasing the chances that such a client would return the following year
22 and/or refer her friends to Defendant. Gregory Garrett, Sr. and Defendant conspired to defraud the
23 IRS and did this to increase Defendant's business through accomplishing higher refunds for her
24 clients. Defendant's business was based very heavily on referrals from her clients. (Exhibit F:
25 paragraph 12). Defendant even told SA Alvarez that she had attempted to advertise her tax
26 preparation business but wasn't very successful so she only obtained clients by word of mouth from
27 her current clients. (Exhibit D: paragraph 14). Defendant also stated that her business has steadily
28

1 increased with these referrals. (Exhibit D: paragraph 14). Therefore, it was important that she got
2 her clients larger refunds so that her clients would refer their friends and co-workers to her. Gregory
3 Garrett, Sr. also had a financial stake in the conspiracy because he is married to Defendant therefore
4 when her business was doing well he benefitted. Gregory Garrett, Sr. had full knowledge of the
5 conspiracy, participated in the conspiracy and furthered the conspiracy for the benefit of he and
6 Defendant. Therefore, any statements he made regarding this conspiracy are admissible against
7 Defendant.

8 **CONCLUSION**

9 For all of the reasons stated, Gregory Garrett, Sr.'s statements to SA Braga on August 6,
10 2003 are admissible as admissions of a party opponent pursuant to Federal Rules of Evidence
11 801(d)(2)(C), 801(d)(2)(D), and 801(d)(2)(E).

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14 DATED: August 14, 2008
15
16 /s/ Christopher S. Strauss
17 Christopher S. Strauss
18 Special Assistant United States Attorney
19 Attorney for Plaintiff
20 United States of America
21 Email: Christopher.S.Strauss@usdoj.gov
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
FE S. GARRETT,)
Defendant.)

Case No. 08CR0918-L

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

10 I, Christopher S. Strauss, am a citizen of the United States and am at least eighteen years of age.

11 My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

12 I am not a party to the above-entitled action.

13 I have caused service of GOVERNMENT'S MOTION IN LIMINE TO INTRODUCE
14 STATEMENTS, pro se, by sending a copy of the motion via Federal Express on August 14, 2008 to
15 Defendant at the following address:

17 Fe Garrett
18 The Geo Group
19 Reg. # 0799-0298
Western Region Detention Facility
220 West C Street
San Diego, CA 92101

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4 I have caused service of GOVERNMENT'S MOTION IN LIMINE TO INTRODUCE
5 STATEMENTS on Defendant's standby counsel by electronically filing the foregoing with the Clerk
6 of the District Court using its ECF System, which electronically notifies them:

7

8 Erica Kristine Zunkel
Erica_zunkel@fd.org
9 Federal Defenders of San Diego
225 Broadway, Suite 900
10 San Diego, CA 92101

11

I declare under penalty of perjury that the foregoing is true and correct.

12

Executed on August 14, 2008.

13

14

/s/ Christopher S. Strauss
CHRISTOPHER S. STRAUSS
Special Assistant United States Attorney

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